No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee.

Opening Brief of Appellant, General Insurance Company of America, a Corporation.

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TOPICAL INDEX.

PAGE

I.

Statement of pleadings and record 2

II.

Jurisdiction 6

III.

Statement of the case 6

IV.

Specification of errors 18

Argument 22

V.

The policy only covers loss of profits which would have been earned 22

VI.

The complaint fails to state a cause of action against the defendant or a claim upon which relief may be granted to plaintiff 27

VII.

The findings of fact do not support the judgment 30

VIII.

Plaintiff did not sustain the burden of proof on it 31

IX.

The evidence does not support the finding of fact that the plaintiff would have made a profit 34

Method A. Based on average profit and loss 35

(a) Taking the eight months preceding the fire as the basis 35

(b) Taking the three months preceding the fire as the basis 38

(c) Taking the months immediately preceding and immediately following the fire as the basis 42

PAGE

Method B. Based on cost of gasoline to plaintiff 45

(a) Taking the eight months preceding the fire as the basis 45

(b) Taking the three months preceding the fire as the basis 47

(c) Taking the months immediately preceding and immediately following the fire as the basis 48

Method C. Plaintiff's actual experience after the fire 49

X.

Polymerization unit 63

XI.

Conclusion 66

INDEX TO APPENDICES.

PAGE

Appendix 1. Profit or loss 1

Appendix 2. Gasoline manufactured 2

Appendix 3. Gasoline purchased 3

Appendix 4. Gasoline sold 4

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138.....28, 33

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337, 89 Pac. (2d) 732.....29, 33

Dark v. Prudential Ins. Co., 4 Cal. App. (2d) 338, 40 Pac. (2d) 906 33

Ells v. Order of United etc. Travelers, 20 Cal. (2d) 290, 125 Pac. (2d) 457..... 32

Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp., 64 Fed. (2d) 347 .....23, 36, 63

Grand Pac. Hotel Co. v. Ins. Co., 243 Ill. 110, 90 N. E. 244.....23, 24

Kellner v. Travelers Ins. Co., 180 Cal. 326, 181 Pac. 61..... 33

Statutes.

28 United States Code Annotated, Sec. 41..... 6

28 United States Code Annotated, Sec. 225..... 6

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Unless otherwise noted all references herein are to pages of the printed transcript of record. The Appendix referred to is the Appendix to this brief.

I.

Statement of Pleadings and Record.

This case originated with the filing of the complaint in the Superior Court of the State of California, in and for the County of Los Angeles.

The complaint alleged [Tr. pp. 2-7] that the plaintiff was a California corporation; that the defendant was a Washington corporation; that the plaintiff was engaged in the manufacturing, production, refining and sale of oil and petroleum products and operated a certain plant for said purposes; that the defendant had issued its certain policy of insurance; that a photostatic copy of the policy was attached to the complaint; that on said 31st day of August, 1940, while the policy was in effect, plaintiff's said plant was damaged by fire as the result of which the plaintiff was deprived of the use and occupancy thereof and its business suspended for a period of ninety-one days; that the plaintiff thereupon gave notice to the defendant of said loss and attempted to make use of other property to reduce the amount thereof; that the plaintiff on or about the 11th day of December, 1940, furnished defendant a verified preliminary proof of loss setting forth the claim of the plaintiff; that on December 20, 1940, the plaintiff on demand for additional information by the defendant furnished the defendant a verified proof of loss setting forth various matters alleged in said complaint, which proof of loss showed a loss to the plaintiff in the amount of $37,672.21; that the defendant failed, refused and neglected to notify the plaintiff in writing of its partial or total disagreement for the amount of loss

claimed by plaintiff or the amount of loss, if any the defendant admitted, on each of the articles or properties set forth in said proofs of loss; that as the result of said fire the plaintiff suffered a loss in the sum of $37,-672.21; that demand was made upon the defendant for the payment thereof but defendant has refused to pay said sum or any portion thereof.

The policy attached to the complaint [Tr. pp. 7-37] is a California Standard Form Fire Insurance Policy to which was attached an endorsement entitled: "Use and Occupancy Form No. 8—Average Clause—Specified Time." It provided that if the buildings and/or structures situated on the property occupied by plaintiff and/or machinery and/or equipment contained therein and/or on said premises be destroyed by fire during the term of the policy so as to necessitate a total or partial suspension of business the company "shall be liable under this policy for the ACTUAL LOSS SUSTAINED, by reason of such suspension, consisting of: Item I. The net profits on the business which is thereby prevented . . ."

On motion of the defendant said cause was removed to the District Court of the United States, Southern District of California, Central Division, upon the ground that a diversity of citizenship existed between the plaintiff and the defendant.

The defendant filed its answer [Tr. pp. 46-50] which in so far as it is material upon this appeal by defendant (as distinguished from the cross-appeal) alleged that its said policy of insurance provided that it should be liable only for the actual loss sustained by reason of suspension of business caused by fire and consisting of the net profits on the

business which was thereby prevented, but only to the extent they would have been earned had no fire occurred; denied that the proof of loss showed loss or damage to the plaintiff by reason of loss of profits in the sum of $37,672.21, or any other sum; denied that the defendant failed to notify the plaintiff in writing of its partial or total disagreement of the amount of loss claimed by the plaintiff, or failed to notify the plaintiff of the amount of loss, if any, which it admitted on each of the different articles or properties set forth in the proofs of loss; denied that by reason of the fire the plaintiff suffered a loss of profits in the sum of $37,672.21, or any other sum, by virtue of its inability to use or occupy the said property, or any property, or at all. The answer also alleged that the complaint did not state facts sufficient to constitute a cause of action against the defendant and did not state a claim upon which relief could be granted to plaintiff.

A pre-trial hearing was held in the District Court [Tr. pp. 172-192].

A trial before the court, without a jury, was had at the conclusion of which the court took the matter under submission and thereafter made its written findings of fact and conclusions of law. The court found amongst other things that as a result of the fire the loss to the plaintiff of profits which would have been earned amounted to $22,974.94, and that the loss to the plaintiff of fixed charges and expenses which would have been earned amounted to $7,348.63, making a total loss of $30,323.57 [Tr. p. 145].

The finding of the court with reference to fixed charges and expenses is not involved in the appeal of the defendant as distinguished from the cross-appeal.

Judgment was thereupon rendered in favor of the plaintiff in the sum of $30,323.57 with interest thereon at 7% per annum from March 11, 1941, together with costs in the amount of $133.62 [Tr. pp. 146-147].

The defendant filed its motion for a new trial, motion to amend findings of fact and conclusions of law and direct the entry of a new judgment, and motion to make findings more definite and certain [Tr. pp. 148-151]. Said motions having come on for hearing were denied [Tr. pp. 152 dd-154]. The judgment in favor of the plaintiff in the trial court has become final.

Within the time allowed by law this defendant filed its notice of appeal [Tr. p. 155].

II.

Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 *U. S. C. A.,* Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 *U. S. C. A.,* Sec. 225.)

III.

Statement of the Case.

Plaintiff was engaged in the business of manufacturing and selling gasoline [Tr. pp. 13, 195]. It was able to sell more gasoline than it manufactured [Tr. p. 223]. Consequently and as a part of its general operations it also purchased and resold gasoline [Tr. p. 214]. It started manufacturing gasoline in the first week in November, 1939, but January, 1940, was its first full month of normal operations [Tr. p. 207].

Neither its income nor its profits or loss were apportioned between the gasoline it manufactured and sold and the gasoline it purchased and sold [Tr. p. 231]. It sold four different brands of gasoline but there is no way of telling how much of its manufactured gasoline or of its purchased gasoline went into each brand [Tr. pp. 221, 229-230], nor was any segregation made of the proportionate cost of the manufacture of gasoline going into each brand, nor of the cost of sales attributable to each [Tr. p. 230].

On January 14, 1940, the defendant issued its policy. This policy is what is known as a "Use and Occupancy"

policy (usually called "U. and O." policy). In fact it was a California Standard Form of Fire Insurance to which an U. and O. endorsement was attached [Tr. pp. 7-37]. The endorsement provided that if the plaintiff's plant was destroyed by fire so as to necessitate a total or partial suspension of business, the defendant would be liable for the ACTUAL LOSS SUSTAINED by reason of such suspension consisting of: "Item I. The net profits on the business which is thereby prevented . . ." [Tr. p. 13]; that the length of time suspension for which loss might be claimed should not exceed 90 days (which we will hereinafter call the suspension period) [Tr. p. 15]; that the company should be liable for no greater proportion of the loss than the amount of $40,000,000 bears to 25% of the total of net profits which would normally have been earned during the period of twelve months immediately following the fire [Tr. p. 15]; that the company should not be liable as to loss of profits for more than the net profits prevented by the suspension of business [Tr. pp. 15-16]; and that in determining the amount of net profits which would have been earned had no fire occurred consideration should be given to the experience of the business before the fire and the probable experience thereafter [Tr. p. 16].

The defendant's policy was not a fire insurance policy covering damage caused by the fire. Plaintiff had such a policy in another company, which paid the fire loss [Tr. p. 215]. *It did not cover any loss sustained by plaintiff as the result of the fire except in so far as such loss consisted of net profit and certain fixed charges and expenses which plaintiff would have earned had it not been for the fire.*

Prior to the fire the plaintiff had contracted for the construction of a polymerization unit, the operation of which would increase plaintiff's revenue. Actual work on the plant had not commenced at the date of the fire [Tr. pp. 322-324] but the plant was to have been erected by October 5, 1940. Owing to the fire the plant was not put in operation during the suspension period as the result of which, plaintiff's witnesses testified, that plaintiff suffered a loss of $3,901.15. On this appeal we are not attacking the amount of this particular claimed loss but are contending that it was not recoverable by the plaintiff at all.

Following the fire the plaintiff had on hand an average of about five or six days' supply of gasoline, of which perhaps one-third might necessarily be minimum working stocks down to the suction lines right in the tanks [Tr. p. 197].

Following the fire the adjuster for the defendant told plaintiff's president to proceed to do everything that was necessary to minimize the loss and get the plant rehabilitated as soon as possible [Tr. pp. 196, 210]. Plaintiff, continued its operations during this suspension period, namely, September, October and November, 1940. It however, manufactured no gasoline during the period, but, in order to fulfill its commitments, it continued to purchase and resell gasoline [Tr. pp. 210-211].

Mr. Devere, president of plaintiff corporation, testified as to the profits made from January to August, inclusive [Tr. p. 233. See also Plf's. Exh. 1, Tr. p. 68]. These figures, however, did not take any depreciation into consideration [Plf's. Exh. 1, Tr. p. 68].

For the convenience of the court, profits or losses for each of the months of the year during which plaintiff manufactured gasoline, with and without taking depreciation into consideration, are shown in Appendix 1.

The total profits for these eight months (still not taking depreciation into consideration) were then divided by eight to give the average monthly profits for those eight months and this average was multiplied by three to represent for three months' suspension period. The amount thus arrived at was increased by 10% to represent an anticipated increase in business. The total, namely, $19,073.79 was plaintiff's estimated loss of profits due to the fire, exclusive of the $3,901.15 loss of profits due to inability to operate the polymerization unit [Tr. pp. 205-206, 238]. The sum of these two amounts, namely, $22,974.94, is the amount awarded plaintiff by the trial court as profits which it would have earned had it not been for the fire [Tr. p. 145].

For the convenience of the court we have attached to this brief as an appendix, tables showing plaintiff's operations for every month during the year 1940 as follows (the prices being given both in decimal points of $1.00 for convenience in checking against the transcript and in cents for ease of understanding in our discussion):

Appendix 2:

(1) Gasoline manufactured.

(2) Cost per gallon of manufacture of gasoline.

Appendix 3:

(1) Gasoline purchased.

(2) Cost per gallon of gasoline purchased.

Appendix 4:

(1) Gasoline sold.

(2) Price received per gallon of gasoline sold.

Mr. Devere on direct examination and again on cross-examination testified that the general market conditions were the same during the suspension period as they were during the early part of the year 1940 [Tr. pp. 213-214, 215-216]. The actual figures furnished by plaintiff itself contradict this statement. Thus the average price obtained by plaintiff for gasoline sold by it steadily increased from 6.485¢ in January to a peak of 7.203¢ for May [Tr. pp. 259-261]. Then came the gasoline war and consequent break in price so that the price of gasoline steadily dropped during June, July and August until for the latter month the average price was only 5.973¢. In September the price rose slightly to 6.177¢ dropping again in October to 6.146¢ and again dropping in November so as to reach the low for the entire year, namely, 5.928¢ [Tr. pp. 260-261]. These figures are tabulated in Appendix 4. Likewise the price paid by plaintiff for the gasoline it purchased followed the same general trend, although its peak was reached in March rather than May. June was the lowest of the first eight months and September, October and November were each lower than any preceding month, with the lowest price being also reached in November [Tr. pp. 81-84, 134-135, 141-142]. These figures are tabulated in Appendix 3.

Mr. Devere also testified on direct examination that as sales increased, profits also increased [Tr. p. 206]. On redirect examination he testified that the reasons for the fluctuations in profits were that plaintiff was endeavor-

ing, amongst other things, to increase the capacity of the plant; that in June plaintiff did some technical work on the furnace and was experimenting some difficulty causing intermittent operation during that period [Tr. pp. 233-234]. He also testified on redirect that August was not a typical month [Tr. p. 234]. Again the figures presented by plaintiff are in conflict with these statements. Plaintiff's figures show that its sales increased steadily from January to April, inclusive, whereas its profits increased only from January to March and dropped off in April. Its sales decreased in May to below the March level, yet May showed a very substantial increase in profits over any prior month. In June its sales were much greater than in any previous month (increasing more than 50% over those of January), yet its profits for June were less even than its profits for January and were only about 27% of its May profits. Its July sales decreased below June yet profits increased nearly 40%. In August sales were considerably higher than in any previous month, yet plaintiff's profits (even excluding depreciation) only amount to $456.96. August sales were approximately 123% of May sales, while August profit was only 4% of that of May [Plf's. Exh. 1, Tr. p. 68]. These figures are tabulated in Appendices 1 and 4.

In the above we have taken plaintiff's own figures without taking depreciation into consideration. While depreciation would reduce or eliminate the claimed profit, it would not affect the trend of profits or losses.

Profits *did not* increase as sales increased as stated by Mr. Devere, but *did* vary as did the prices obtained by plaintiff for the gasoline it sold. Likewise market con-

ditions *did vary* greatly throughout the year, advancing until May, dropping until August, rising slightly in September and again dropping to a new low through November, and then rising in December.

A comparison of the average prices per gallon received by plaintiff shows the following:

For the first five months of the year 6.787¢; for June, July and August 6.203¢; for September, October and November (suspension period) 6.084¢. (See Appendix 4.)

We would call the attention of the court to Defendant's Exhibits B, C and D which show in graphic form the variation in prices received, and how profits (with and without depreciation) varied almost exactly as did these prices.

Exhibit B [Tr. pp. 125, 343] shows the prices received by plaintiff for gasoline for each of the months of the year 1940. It will be observed that the peak was reached in May and the low point in November, with a secondary low point in August, the latter, however, being slightly higher than the low point for November. It will also be observed that the average prices for the suspension period, September, October and November, are lower than for the immediately preceding three months of June, July and August, and of course greatly lower than the average price for the first five months of the year.

In Exhibit B [Tr. pp. 126, 346] the upper line shows the actual profits made by plaintiff during each of the months January to August, inclusive, if depreciation is not taken into consideration.

The lower line shows the actual profits made by plaintiff from January to July, inclusive, and the loss sustained in August, if depreciation, as shown by plaintiff's books, is taken into consideration.

Exhibit D [Tr. pp. 127, 347] is a combination of Exhibits B and C and shows how plaintiff's profits or losses varied almost exactly as did the prices received by plaintiff for its gasoline. Thus, the thin black line in Exhibit D is the same line as the line on Exhibit B, and the red lines on Exhibit D are the same as the red lines on Exhibit C.

Mr. Devere also testified that during the three months' suspension period, plaintiff averaged about 20% more in sales volume than for the months of June, July and August, and that in November it probably averaged more than 20% greater than in August [Tr. pp. 211, 219-220]. In fact the average increase for the suspension period over the preceding three months of June, July and August was approximately 14%; and the increase for November over August was slightly less than 14%. He testified that the increase in December over August was about thirty to thirty-five per cent [Tr. p. 220], whereas in fact it was almost exactly 19%. The figures upon which these actual percentages are calculated are set forth in Appendix 4.

So far in discussing the figures for plaintiff's profits we have not included any allowance for depreciation [Ptf's. Exh. 1, Tr. p. 68]. Devere testified on direct examination that plaintiff used the item of $3,034.99 as depreciation because "we felt that that represented the

true depreciation for the first eight months. There was considerable depreciation of material values, and we felt that that properly and correctly reflected the actual depreciation in the plant during that period" [Tr. pp. 208-209]. However, in fact, even this figure of $3,034.99 does not appear anywhere in plaintiff's computation of profits [Ptf's. Exh. No. 1, Tr. p. 68].

Devere testified that the plaintiff's books and records reflected a different depreciation, namely, depreciation allowable under the income tax laws [Tr. pp. 208-209]. On cross-examination he testified that the higher figure shown on plaintiff's books, namely, $23,079.59, was 10% per barrel of oil processed through the plant and was arrived at by taking the total plant value, appraising the useful life of the individual unit parts of the plant and working out a composite annual figure in dollars and cents. He testified that taking into consideration the depreciation as shown by plaintiff's books, plaintiff operated at a loss for the month of August [Tr. pp. 218-219].

Plaintiff's auditor, Young, testified as to the amount of depreciation for each month as shown by plaintiff's books [Tr. pp. 273-274]. He testified this depreciation, figured on the estimated life of the various component parts of the plant, gave a depreciation that was very close to the figures shown upon plaintiff's books and used in their Federal and State Income Tax Returns [Tr. pp. 299-303]. The effect of this depreciation so testified to and appearing on plaintiff's books is shown in Appendix 1.

An inspection of these profits or losses shows (Appendix No. 1) an increasing profit from January to May with a very sharp drop off for June, July and August.

In fact, if depreciation is to be considered, August shows a substantial loss. This is expressly admitted by plaintiff [Tr. pp. 219, 274]. It will further be noted that this substantial drop in plaintiff's profits coincided with the break of market conditions above referred to. This is clearly visualized in Defendant's Exhibits B, C and D [Tr. pp. 125-127].

If we are to assume that during the suspension period plaintiff would have made the same average monthly profit as it had averaged over the *entire* eight months preceding the fire, plaintiff would have made a profit during the suspension period, and this profit would have been approximately as found by the court, provided depreciation is not to be taken into consideration. It would have been much lower than that found by the court if depreciation is to be considered.

On the other hand if we are to assume that during the suspension period plaintiff would have made the same average monthly profit as it had averaged *after* the break in the market, that is, during the three months immediately preceding the fire, or as it made during the month immediately preceding and the month immediately following the suspension period, during all of which periods market conditions were much more similar to those existing during the suspension period than were market conditions during the first five months of the year, then, without considering depreciation, plaintiff would have made a very small profit during the suspension period, or if depreciation is considered, it would have sustained a substantial monthly loss during that suspension period.

If, however, the true criterion is whether the plaintiff would have made a profit had it not during the suspension period incurred the extra cost of purchasing instead of manufacturing gasoline, the evidence discloses the following situation:

During the first eight months of the year plaintiff purchased and manufactured 6,640,260 gallons of gasoline at a total cost of $320,892.06. This gives an average cost per gallon of 4.833¢.

During the three months following the break in the market and immediately preceding the fire plaintiff purchased and manufactured 2,762,954 gallons at a total cost of $135,716.30. This gives an average cost per gallon of 4.912¢.

During August and December, the months immediately preceding and following the fire, plaintiff purchased and manufactured 2,231,765 gallons at a total cost of $108,-553.05. This gives an everage cost per gallon of 4.864¢.

During the suspension period plaintiff manufactured no gasoline but purchased 3,104,715 gallons at a total cost of $174,329.74. This gives an average cost per gallon of 5.615¢.

The extra cost to plaintiff of the acquisition of these 3,104,715 gallons of gasoline during the suspension period over what this amount of gasoline would have cost in each of these periods would therefore be, respectively, $24,-278.87, $21,876.14 and $23,316.41.

All of the above figures are mathematical computations from those shown on Appedices 2, 3 and 4, which in turn refer to the Transcript of the Record.

During the suspension period plaintiff actually operated at a loss of $32,975.68 [Plf. Exh. 1, Tr. pp. 67, 251-252]. Yet from the above figures its maximum extra cost of gasoline for the suspension period was only $24,278.87.

Consequently, even had it not incurred this extra cost, plaintiff would have sustained a loss during the suspension period of from $8,696.81 to $11,099.54. Even if we deduct from this loss the entire amount which plaintiff claims it would have saved by reason of the polymerization unit, plaintiff would still have suffered a loss for the suspension period of from $4,795.66 to $7,198.39.

Very similar results are obtained by taking plaintiff's own statement of the excess cost to it of having to purchase rather than manufacture gasoline during the suspension period.

During this period it purchased 3,104,715 gallons of gasoline. Plaintiff itself filed an exhibit showing that the excess cost of the purchase of all of this gasoline over what it would have cost plaintiff to have manufactured all thereof was the sum of $30,995.94 [Plf. Exh. 7, Tr. pp. 124, 313, Appendix 5].

In any event and had there been no fire, plaintiff would have purchased a certain amount of this gasoline. The amount it would have so purchased is variously estimated from 14%, according to plaintiff's estimate upon the trial, to 33% based on its December operations.

Taking the 14% estimate, the extra cost to plaintiff of having to purchase rather than manufacture gasoline amounts to $26,656.51. Had it made this saving through manufacturing rather than purchasing this gasoline, plaintiff would still have operated at a loss for the suspension period of $32,975.68 minus $26,656.51, that is at a loss of $6,319.17. Even if this loss is reduced by the entire amount which plaintiff claims it would have saved by the use of the polymerization unit, plaintiff would still have sustained a loss for the suspension period of $2,418.02.

If the 33% estimate is taken, plaintiff's loss for that suspension period would have been $8,307.26.

IV.

Specification of Errors.

I.

That the findings of fact do not support the conclusions of law or judgment in that there is no finding:

(a) That the plaintiff sustained any actual loss by reason of the suspension of its business caused by said fire and consisting of net or any profits on its business thereby prevented.

(b) That the plaintiff sustained an actual loss by reason of the suspension of its business caused by said fire consisting of net or any profits in the sum of $22,974.94, or in any other sum on its business thereby prevented.

(c) That the sum of $22,974.94, or any other sum, was not a greater proportion of the loss sustained by the plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned during the period of twelve months immediately following said fire.

(d) That plaintiff would have earned net or any profits in the sum of $22,974.94, or in any other sum, within the suspension period provided in said policy; that is, within the three months after the date of said fire; and

(e) In that there is no finding as to the period of time over which the court found a loss to the plaintiff of profits which would have been earned amounted to $22,974.94.

II.

That the judgment in this case is contrary to law in that:

(1) Said judgment includes an award to plaintiff in the sum of $22,974.94 under Item I of defendant's policy

for the loss to plaintiff of profits which it would have earned during the three months immediately following the 31st day of August, 1940, being the date of the fire involved in this case, whereas, in fact, even had there been no such fire, the plaintiff would not have made profits in said or any sum during said period from its manufacturing business or at all.

(2) That included in said award to plaintiff of said sum of $22,974.94, is the sum of $3,901.15 for loss of profits from a polymerization unit, whereas said item is not under the law recoverable by plaintiff in this action.

(3) That said award to plaintiff was made despite the absence of any evidence that the amount awarded to plaintiff was not a greater proportion of the loss sustained by plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned by plaintiff during the period of twelve months immediately following said fire.

(4) That the complaint did not state facts sufficient to constitute a cause of action against the defendant, nor a claim upon which relief might be granted to the plaintiff.

(5) Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court (Finding No. IX) that as a result of the fire of August 31, 1940, the loss to the plaintiff of profits which would have been earned amounted to $22,974.94 in that:

(1) The evidence is insufficient to support said finding.

(2) The evidence affirmatively establishes that the fire involved in this case occurred on the 31st day of August, 1940; that it was a condition of the defendant's policy of insurance that if the buildings and/or structures of the plaintiff and/or machinery and/or equipment contained therein be destroyed or damaged by fire so as to necessitate a total or partial suspension of plaintiff's business, the defendant should be liable under its policy for the actual losses sustained by reason of such suspension consisting of Item I: "The net profits on the business which is thereby prevented."

That it was a further condition of said policy that the length of time of suspension for which plaintiff could recover under said policy should not exceed three months immediately following said fire, and that said policy did not provide for any other recovery by the plaintiff against the defendant except for certain items of fixed charges and expenses which are not involved in this appeal by the defendant from said judgment.

That the evidence further affirmatively establishes that during the said three months immediately following the date of said fire, to wit, the 31st day of August, 1940, even had no fire occurred, the plaintiff:

(a) Would not have earned net or any profits in said sum of $22,974.94, or in any other sum;

(b) Would not have earned net or any profits from the business prevented by said fire in said sum, or in any other sum;

(c) Would not have made profits from the business prevented by the fire, or otherwise, in said sum or in any other sum;

(d) Would have operated its business at a loss to plaintiff.

(3) That the evidence is insufficient to sustain the award to the plaintiff of the sum of $3,901.15, being a part of said sum of $22,974.94, on account of loss of profits from said polymerization unit in that the evidence affirmatively shows that the plaintiff was not entitled to recover the said item in this case.

(a)

III.

That the finding of fact No. IX is contrary to the evidence for the reasons and each of them set forth in Subdivision III above.

IV.

That the judgment in this case is excessive:

(1) In that it contains an award to the plaintiff of $22,974.94 for loss of profits which the plaintiff would have earned during the three months immediately following said fire, whereas, the evidence fails to support said finding, or any finding that the plaintiff would have earned or made said profit of $22,974.94, or any similar profit, or any profit during said three months immediately following the fire, but on the contrary establishes that the plaintiff would not have earned any profit during said three months even had there been no fire.

(2) In that the evidence fails to show that said amount awarded plaintiff or any other sum would not have been a greater proportion of the loss sustained by plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned by plaintiff during the period of twelve months immediately following said fire.

(3) In that it contains an award for the plaintiff in the sum of $3,901.15 on account of loss of profits from said polymerization unit, whereas, plaintiff is not entitled in this action to recover any sum for any such loss.

ARGUMENT.

V.

The Policy Only Covers Loss of Profits Which Would Have Been Earned.

As will be observed from the foregoing statement of the case, in order to entitle the plaintiff to recover under Item I of the policy, which alone is involved in the defendant's appeal, the following conditions must have been met:

(1) A fire.

(2) Destruction of or damage to plaintiff's buildings, machinery or equipment.

(3) Suspension, total or partial, of plaintiff's business caused thereby.

(4) Actual loss sustained by plaintiff thereby, provided such actual loss consisted of: Net profits

(a) which would have been earned during the suspension period;

(b) which would have come from the business prevented by the destruction or damage caused by the fire.

(5) The loss claimed by plaintiff must not exceed a greater proportion of plaintiff's total loss than the amount insured by the defendant's policy bears to 25% of the total net profits (Item I) and charges and expenses (as provided in Item II) which would normally have been earned during the twelve months immediately following the fire.

The above provisions of the policy are found on pages 13 to 16 of the printed transcript.

The case was tried upon the theory that plaintiff's recovery, if any, was limited to profits and certain fixed charges and expenses which it would have earned had there been no fire. This was stipulated to on the pretrial hearing [Tr. pp. 190-191], which proceedings were expressly incorporated in the trial of the case [Tr. p. 329]. The findings made by the court were expressly that the plaintiff would have earned a profit and would have earned the fixed charges and expenses [Finding IX, Tr. p. 145]. The trial court on motion for new trial twice expressly stated that plaintiff had to make a profit in order to recover anything [Tr. pp. 152v, 152dd].

The authorities are clear to the same effect:

> *Grand Pacific Hotel Co. v. Insurance Co.,* 243 Ill. 110; 90 N. E. 244;
>
> *Fidelity-Phenix Fire Insurance Company v. Benedict Coal Corporation* (C. C. A. 4), 64 Fed (2d) 347.

Nevertheless we cannot help feeling that the court, while paying lip service to the policy provisions, in fact "re-wrote" the policy to conform to its ideas as to what it should have contained and so as to give plaintiff a coverage which it had not bought and for which it had not paid. Thus, at the termination of plaintiff's case in chief, the court asked us what was our position [Tr. p. 328]. We replied in strict accordance with the provisions of the policy, the law and the stipulation of plaintiff's counsel [Tr. p. 328]. The court thereupon said [Tr. p. 329]:

> "I am surely going to give you something to appeal on when we get through with this case; I will

> tell you this right now, gentlemen; so you might as well prepare to protect your records. . . . And I am going to give you the chance to build up a good record for appeal to the Circuit Court and let them iron out the law on this because I am not going to let you issue this kind of a policy and let you crawl out on any theory like that. I am telling you that right now so you can prepare an appeal and let the Circuit Court of Appeals thresh it out."

Again at the close of the case the court said [Tr. p. 385]:

> "I am going to read your briefs and your authorities, and am going to try to arrive at a figure in this case that I think is fair and equitable. Then if either side is dissatisfied with it let the Circuit Court take the record and see if they can figure out something that is different."

In view of the attitude of the trial court it may be well to point out that the object of a use and occupancy policy is *not* to insure the ability of the insured to continue in business. It merely insures against loss of profits (and certain fixed charges and expenses) for a certain time. In *Grand Pacific Hotel Co. v. Insurance Co., supra,* 243 Ill. 110; 90 N. E. 244, a fire destroyed a certain hotel which the insured held under lease. The destruction of the hotel gave the owner an opportunity to cancel the lease. The insured claimed to be entitled to recover for its loss of profits for the entire unexpired term of the lease. The Court held against this contention saying p. 113:

> "The termination of appellee's lease ended the receipt of profits from the hotel business for the time

being, and appellee insured against the cessation of profits by fire, but only for a limited period specified in the policy. The fire merely furnished the condition which enabled the lessor to terminate the lease in accordance with its terms, but whether the fire was the cause of the termination of the lease or not is immaterial. The policy was free from ambiguity and the words used had a precise, definite and well understood meaning. No language could more clearly express the intention of the parties as to the time for which the loss should be computed. The policy did not insure appellant in the possession of the premises against forfeiture of the lease and appellee did not agree to keep appellant in the use and occupancy of the premises, but only agreed to pay its *pro rata* share of the loss for a period computed from the day of the fire to the time when the building and equipment therein could with ordinary diligence and dispatch be rebuilt, repaired or replaced. To say that the language used meant anything different would be to make a new contract, and the construction given to the policy by the superior court was correct."

The theory of the case is obviously correct. The only loss which necessarily follows from a fire (other than the destruction of the property itself which in the present case was covered by a policy in a different company) [Tr. p. 215] is the loss of profits derived from that property, if any such would have been made, and of necessarily continuing fixed charges and expenses, likewise if they would have been earned. Any other loss is purely voluntary on the part of the insured being probably incurred only with a view to future business, which future business is not insured under the policy.

Assume a manufacturer could not have manufactured its product except at a loss during a suspension period caused by a fire, obviously a complete suspension of its manufacturing business during that suspension period would result in a saving of that loss. If, however, the assured for reasons of its own decides that it is better to continue in business and incur an even greater loss consequent upon purchasing the article to replace what it would have manufactured, this is a purely voluntary act on its part, for which it cannot obtain a recovery from one who has only insured it against *loss of profits* that would have been earned during the period of time necessary to rehabilitate its plant.

To make the present policy cover an actual loss sustained probably for the purpose of aiding plaintiff's business after its resumption, which is what we believe the court in fact did do, amounts, in the words of the court quoted above, to the writing of a new contract between the parties into which they themselves did not see fit to enter.

VI.

The Complaint Fails to State a Cause of Action Against Defendant or a Claim Upon Which Relief May Be Granted to Plaintiff.

In the last subdivison of this brief we have set forth the elements necessary to entitle plaintiff to a recovery.

The complaint alleges in paragraph X [Tr. p. 6]:

> "That as the result of the fire of August 30, 1940 this defendant (obviously a misprint for plaintiff) suffered a loss in the amount of Thirty-seven Thousand Six Hundred Seventy Two and 21/100 Dollars ($37,672.21) by virtue of its inability to use and occupy the property described in Exhibit A."

This is not an allegation that the plaintiff suffered a *loss of profits* in said or any sum by reason of the fire, nor is it an allegation that the plaintiff sustained any loss by reason of fixed charges and expenses which it would have earned had it not been for the fire (the only other item covered by the policy). If, were it not for the fire, the plaintiff would not have earned enough to make up this loss of $37,672.21, then it is obvious that, even had there been no fire, plaintiff would have made no profits and would not have earned its fixed charges and expenses and, therefore, would not be entitled to any recovery under the policy.

The complaint nowhere alleges that the alleged loss of $37,672.21 was sustained during the suspension period, yet the policy clearly covers only loss of profits and of fixed charges and expenses sustained during that suspension period, namely, ninety days [Tr. pp. 14-15]. Again the complaint nowhere alleges what would normally have been earned by plaintiff during the period of twelve months immediately following the fire, nor that the amount claimed by plaintiff was no greater proportion of

its loss than the amount insured by said policy bears to 25% of the net profits and charges and expenses which normally would have been earned by plaintiff during the period of twelve months immediately following the fire.

Each of these allegations was a necessary allegation in plaintiff's complaint. Thus it is said in *Allen v. Home Insurance Company,* 133 Cal. 29, 30; 65 Pac. 138, 138:

> "It is first claimed that the court erred in overruling the demurrer to the amended complaint. The principal contention under this head is, that the complaint does not allege that the building, at the time of the fire, was occupied as a dwelling house. It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling-house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling-house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. (*Green v. Palmer,* 15 Cal. 413; *Spring Valley Water Works v. San Francisco,* 82 Cal. 323.)
>
> "In declaring upon a contract of insurance, so much of it as will show a right to recover must be set out, in terms or in substance. (2 *May on Insurance,* 4th ed., sec. 589.)
>
> "Accordingly, it has been held that where the policy was upon the stock of a commission merchant, while in a certain warehouse, the complaint must allege that the stock was in such warehouse at the time of the fire. (*Todd v. Germania Fire Ins. Co.,* 1 Mo. App. 472.)
>
> "Where a policy of insurance confined the insurance to the building while located and occupied by the plaintiff in the town of Newfane, it was held

that the case should be reversed because the condition was not alleged in the complaint. (*Powers v. New England Fire Ins. Co.*, 68 Vt. 390.)

"The allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover. Certain conditions subsequent to the right of recovery, matters of defense, the nonperformance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to the essence of the cause of action. The facts alleged in this complaint may all be true, and yet the plaintiff not be entitled to recover. She could not recover unless she proves more than the complaint alleges. It was therefore error to overrule the demurrer."

See also:

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337, 346; 89 Pac. (2d) 732, 738.

In the present case in order to bring itself within the policy provisions plaintiff had to establish that by reason of the fire it sustained a *loss of net profits* which it would have earned during the suspension period from the business prevented by the destruction or damage caused by the fire. All it alleged in its complaint was that it had sustained a loss by reason of the fire. Certainly, as said in the cited case, it may be true that because of the fire plaintiff sustained a loss and yet plaintiff be not entitled to recover if that loss was not a loss of net profits which would have been derived from the business whose suspension was caused by the damage occasioned by the fire.

The defendant in the case at bar specifically pleaded that the complaint did not state a cause of action or a claim upon which relief could be granted to the plaintiff. The defense was good and should have been sustained.

VII.

The Findings of Fact Do Not Support the Judgment.

Among the conditions prerequisite to a recovery by the plaintiff are:

(a) The plaintiff must have sustained an actual loss consisting of net profits which it would have earned on the business prevented by the fire. While the court does find [Finding No. IX, Tr. p. 145] that as a result of the fire the loss to the plaintiff of profits which it would have earned amounted to the sum of $22,974.94, there is no finding that the business prevented by the fire would have earned those profits. Such finding is necessary to support a judgment for that loss since, if a loss of profits was occasioned to the plaintiff by the fire but for some reason other than the prevention of plaintiff's business due to that fire, it would not be recoverable under the policy.

(b) Again while said finding No. IX is to the effect that plaintiff sustained a loss in said sum, there is no finding that this loss represents profits which would have been earned during the suspension period. Again under the provisions of the policy such a finding is essential before recovery can be had for any such loss.

(c) There is no finding as to the net profits which plaintiff would normally have made during the twelve months immediately succeeding the fire, nor that the amount of the loss claimed by the plaintiff did not bear a greater proportion to its total losses than did the amount insured by the defendant's policy bear to 25% of said profits which the plaintiff would normally have earned during the twelve months immediately succeeding the fire.

The findings of fact are, therefore, insufficient to support the judgment.

VIII.

Plaintiff Did Not Support the Burden of Proof on It.

The burden of proof was upon the plaintiff to establish that it sustained a loss of profits by reason of the fire. The evidence not only failed to show this but actually established that even had there been no fire the plaintiff would have operated at a loss during the suspension period. This matter will be considered at length in our discussion of the insufficiency of the evidence to sustain the findings.

The burden of proof was also upon the plaintiff to establish that such loss of profits, if any, as it would have sustained, during the suspension period was from a business prevented by the fire. From the inception of its operations plaintiff maintained two distinct businesses. One, the manufacture and sale of gasoline, and two, the purchase and resale of gasoline. *Only the former was interrupted by the fire.* While the plaintiff introduced evidence as to its claimed profits from all its operations prior to the fire, there was no evidence as to what proportion thereof was attributable to its manufacturing business rather than to its business of purchasing and reselling gasoline. It placed four distinct brands of gasoline on the market, which sold for different prices [Tr. p. 266], but there is no evidence as to the price for which each brand sold, nor as to how much of its manufactured or purchased gasoline went into any of these four brands. Consequently there is no way of telling how much of the plaintiff's claimed profits were *not* attributable to the reselling of purchased gasoline, but resulted from the gaso-

line it manufactured. The evidence of plaintiff's experience before the fire, therefore, furnishes no indication as to the amount of profits, if any, which it would have earned during the suspension period from the manufacture of gasoline and the sale thereof.

As will be pointed out at length in our discussion of the insufficiency of the evidence to support the findings, it appears that the plaintiff conducted its operations during the suspension period at such a loss that even had it been able to manufacture instead of purchase gasoline, this loss would not have been turned into a profit.

Finally on this point there was no evidence whatsoever as to the probable experience of the plaintiff for the twelve months immediately succeeding the fire. Consequently there was no evidence as to whether or not the amount claimed by plaintiff was a greater proportion of plaintiff's entire loss than the amount insured by the defendant's policy bears to 25% of the total net profits which plaintiff would normally have earned during that twelve months' period.

The burden was upon the plaintiff to bring its claim within the policy coverage by establishing each of the above elements. Its failure so to do renders the judgment in its favor unsupported by the evidence.

In the latest California case we have found upon the subject, namely, *Ells v. Order of United etc. Travelers*

(1942), 20 Cal. (2d) 290, 304, 125 Pac. (2d) 457, 464, it is said:

> "The burden was on the respondents to establish as a part of their case that death resulted from an accident, as defined by the terms of the contract of insurance, and it was not incumbent on the appellant to prove that death was not caused by accident. (*Rock v. Travelers Ins. Co.*, 172 Cal. 462 (156 Pac. 1029)."

See also numerous other cases including:

Allen v. Home Ins. Co., 133 Cal. 29, 33, 65 Pac. 138;

Kellner v. Travelers Ins. Co., 180 Cal. 326, 330, 181 Pac. 61, 63;

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337, 346, 89 Pac. (2d) 732, 738, *supra;*

Dark v. Prudential Ins. Co., 4 Cal. App. (2d) 338, 342, 40 Pac. (2d) 906, 908.

IX.

The Evidence Does Not Support the Finding of Fact That the Plaintiff Would Have Made a Profit.

The policy provides (Provision 5) that in determining the net profits due consideration shall be given to the experience of the business before the fire and the probable experience thereafter [Tr. p. 16].

As shown in our statement of facts, several methods have been suggested to ascertain what would have been plaintiff's profit or loss during this suspension period had there been no fire.

Method A: Find the plaintiff's average profit or loss for a certain period and assume plaintiff would have operated for the suspension period with the same average result.

Method B: Take the average cost per gallon to plaintiff of all its gasoline, including both manufactured and purchased, over a period and multiply this by the number of gallons plaintiff actually purchased during this suspension period. Compare this with the actual cost of that gallonage so purchased. The difference would be the extra cost to plaintiff of purchasing all its gasoline over the cost to it of manufacturing some and purchasing the remainder of that gasoline. Ascertain if this difference would have turned plaintiff's admitted loss for the suspension period into a profit.

Method C: Ascertain the amount of gasoline which plaintiff would have manufactured during the suspension period had there been no fire, compare the cost of manufacturing such amount of gasoline with the cost of pur-

chasing the same amount; ascertain whether if plaintiff had manufactured, rather than purchased, this amount of gasoline the savings it would thereby have made would have changed its admitted loss for the suspension period into a profit. We believe this method is the most accurate of all.

METHOD A.

Based on Average Profit or Loss.

Three periods have been suggested which might be taken as the basis for use under this method:

(a) The eight months preceding the fire.

(b) The three months immediately preceding the fire.

(c) The month immediately preceding and the month immediately succeeding the suspension period.

Of course this method is based on the assumption that the plaintiff would have operated during the suspension period at the same average profit or loss as for the period with which it is being compared.

(a)

Taking the Eight Months Preceding the Fire as the Basis.

This is the method advocated by plaintiff and adopted by the trial court [Tr. pp. 152 q, 205, 238].

Thus the method used by plaintiff's auditor [Tr. pp. 205, 238] was to take the entire profit for the eight months preceding the fire, divide it by eight to get the average monthly profit for that period and then multiply that average by three to represent the three months' suspension period. Adding 10% to represent anticipated increase in business, and $3,901.15 on account of the

polymerization unit plaintiff's auditor reached a figure of $22,974.94 as representing the profits plaintiff would have earned during the suspension period. The trial court adopted this method [Tr. p. 152 q] and found plaintiff's loss of profits to have been in that amount. These figures, however, are without allowance for depreciation.

Depreciation must, however, be taken into consideration. It is an item of expense of doing business like any other item and may not be ignored. (*Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C. C. A. 4), 64 Fed. (2d) 347 at 353.)

Mr. Devere, plaintiff's president, testified that "we felt that" $3,034.93 would represent the depreciation during these eight months, but his testimony was so unreliable as to other figures that this "feeling" cannot be accorded any weight. Thus, as pointed out in our statement of facts, he testified that market conditions remained the same throughout the year, whereas they varied greatly; that as sales increased profits increased, whereas in many cases the exact opposite was the fact; that the fluctuation in profits was caused by plaintiff's endeavors to increase the capacity of its plant, whereas these fluctuations were primarily due to variations in the prices obtained by plaintiff for its gasoline; that plaintiff increased its business for the suspension period over the three preceding months by 20%, whereas the increase was only 14%; and that the increase in business for November was over 20% of that of August, whereas it was not quite 14%, and that the increase for December over August was from 30 to 35%, whereas it actually was

19%. Yet Mr. Devere, as president of plaintiff corporation, was called by plaintiff to establish plaintiff's losses and was asked these questions on direct examination. It cannot, therefore, be said that he was taken by surprise. The fact remains that on these vital matters to plaintiff's cause of action, Mr. Devere was either grossly ignorant or was very careless in his assertions. It would be curious if he were right as to his "feeling" about depreciation and wrong in his positive testimony about market conditions, reasons for fluctuation of profits, increase in business, etc.

However, on cross-examination he was obliged to admit that plaintiff upon its books carried depreciation at a much greater sum, in fact, at a total of $23,079.59 for these eight months; that this was the figure reported on plaintiff's income tax returns; was 10¢ per barrel of oil processed through the plant, and was arrived at by taking the total plant value, appraising the useful life of the individual unit parts of the plant and working out a composite annual figure in dollars and cents.

Mr. Young, plaintiff's auditor, did not support Mr Devere's "feeling" as to depreciation. On the other hand he testified that the books showed a depreciation of $23,-079.59 for these eight months, and that this depreciation figured on the estimated life of the various component parts of the plant gave a depreciation that was very close to that shown upon plaintiff's books and used upon their Federal and State Income Tax returns and the court accepted Mr. Young's testimony [Tr. p. 152 q].

If we do take this depreciation into consideration we find that for the eight months prior to the fire, plaintiff's

profit was $26,194.95 (Appendix 1). This divided by eight and multiplied by three equals $9,823.11. Add 10% and the $3,901.15 for the polymerization unit and we have a total of $14,706.57 as representing plaintiff's anticipated profits for the suspension period.

Therefore, under plaintiff's own method of computation, taking its own figures and accepting its own auditor's computations, but also taking into consideration depreciation as shown on its own books and as figured in the ordinary way, that is on the basis of the life of the plant, we find that the evidence would support no finding of profits which the plaintiff would have made during the suspension period in excess of $14,706.57. Since depreciation must be taken into consideration, even adopting plaintiff's own method of using the entire preceding eight months as the basis, the finding made by the court that the plaintiff would have earned profits of $22,974.94 is unsupported by the evidence and the amount awarded plaintiff is excessive.

(b)

Taking the Three Months Preceding the Fire as the Basis.

The method of computation which we have just considered might afford a reasonable ground for computing the anticipated profits for the succeeding three months if there had been no marked change in market conditions during the year. HOWEVER, MARKET CONDITIONS DID CHANGE. The average price obtained by plaintiff for its gasoline for the first five months of the year was 6.787¢ per gallon. THEN CAME THE BREAK IN THE MARKET. For the next three months, June, July and August, the

average price obtained by plaintiff for its gasoline was only 6.203¢ per gallon. On the other hand the average cost of manufacture of gasoline rose from 4.605¢ per gallon for the first months to 4.613¢ for June, July and August [Appendices 2 and 4. See Def's. Exh. B, Tr. p. 125. which visualizes the situation.]

We would, therefore, expect to find a sharp drop in the profits made by plaintiff for these months of June, July and August from the profits made during the first five months of the year *and this is exactly what we do find* [Appendix 1. See Def's. Exhs. C and D, Tr. pp. 126-127, which visualize the situation].

Average Monthly Profit or Loss.

	Without Depreciation.	With Depreciation
First five months of year	$8,296.09	$5,421.23
June, July and August	2,598.03	— 303.73

For the next three months, namely, the suspension period, the average price obtained by plaintiff was even lower than that of June, July and August, averaging only 6.084¢ per gallon [Appendix 4, Def's Exh. B].

It inevitably follows that for these three months of suspension, plaintiff's average profit would have been lower or its average losses would have been greater than for the months of June, July and August.

Yet the court found that the profits plaintiff would have made during this suspension period were approximately three times the profit it made during June, July and August without deduction for depreciation.

It is obvious that the falacy in the method used by the court in arriving at its findings is the failure to take into consideration the break in the market at the end of May and the consequent sharp drop in prices for the remainder of the year [Appendix 4, Def's. Exh. B].

It will be remembered that the figure arrived at by the court as representing plaintiff's profits for the suspension period was arrived at by taking the average profit for the *entire eight months* preceding the fire and assuming that plaintiff would have made the same average profit for the suspension period [Tr. pp. 152 q, 205, 238]. In order, therefore, to support the finding of the court, we must assume that the same profit would have been made by plaintiff when the price it received for its product was 6.084¢ per gallon as it had made when it received 6.568¢ per gallon for that product, this being the average price received for these eight preceding months. In other words, we must assume that a drop of practically ½¢ a gallon made no difference in the profit plaintiff would have made. This is an obvious absurdity, especially since under plaintiff's own estimate [Ptf's. Exh. 7, Tr. p. 124] the average cost of manufacture of that product would have been the same during the suspension period as during these eight preceding months.

Reduced to its simplest terms, the assumption of Mr. Young, plaintiff's auditor, and of the court is that with the cost of production remaining constant, the producer would make the same profit whether his sales price was 6½¢ or 6¢ per gallon.

Since the price obtained during the suspension period (6.084¢) though lower, more closely resembled the aver-

age price obtained during June, July and August (6.203¢) than it did the average price obtained for the entire eight preceding months (6.568¢), these last three months obviously furnish a much better criterion than that average price for the eight months as to what would have been plaintiff's experience during the suspension period had no fire occurred [Appendix 4, Def's. Exh. B.] Even this, however, gives a result more favorable to the plaintiff than the actual facts justify because of the average lesser prices obtainable during the suspension period even than during June, July and August [Appendix 4, Deft's. Exh. B].

However, using June, July and August as our basic period, we find that, without taking depreciation into consideration, plaintiff would have made an average profit for June, July and August of $2,598.03 [Appendix 1]. Multiply this by 3 and add 10% and the $3,901.15 and we get $12,474.66 as plaintiff's profits for the entire suspension period.

Since the court found the plaintiff would have made a profit of $22,974.94 for the suspension period this is equivalent to finding that for that suspension period of three months plaintiff would have made a monthly profit of almost twice its profit for June, July and August without deduction for depreciation, and this despite the fact that the average price of gasoline was lower during the suspension period than during these months of June, July and August.

If we consider depreciation, plaintiff instead of making a profit for June, July and August, would have operated at a loss of $911.19 for this period. As prices for gaso-

line continued to drop appreciably lower during the suspension period, but the cost of manufacturing would have remained practically constant, the 10% increase in business would not have changed this loss to a profit. Had there had been no fire depreciation would have continued so that, even allowing plaintiff the full $3,901.15 for the polymerization unit, it would only have made a profit of $2,989.96 for that suspension period.

Obviously then, if this method be the correct method to employ, the finding of the court of profit that would have been made by plaintiff is without support in the evidence and is excessive by at least $19,984.98.

(c)

Taking the Months Immediately Preceding and Immediately Following the Fire as the Basis.

If we use as the basis the months of August and December, we find that the average price per gallon received by plaintiff for its gasoline during these two months was 6.033¢, whereas the average price obtained by plaintiff for its gasoline during the suspension period was 6.084¢, a difference of 1/20¢ per gallon [Appendix 4, Def's. Exh. B]. Consequently the prices received during August and December and those during the suspension period more closely approximate each other than do the prices received during the suspension period and either of the other two periods considered, namely, the eight preceding or the three preceding months.

According to plaintiff's own books, without consideration of depreciation, plaintiff made a profit for the combined months of August and December of $801.19, during the latter of which months the polymerization unit

was in operation [Appendix 1]. If this is divided by two and multiplied by three it would give a total profit of $1,201.80 for the suspension period. On the other hand if depreciation is taken into consideration the total *loss* to plaintiff for the months of August and December is $5,641.28 [Appendix 1]. This divided by two and multiplied by three would give a total loss for the suspension period of $8,461.92.

We would now ask the court to look at the following table remembering that the figures for August and December are taken from plaintiff's own records:

Profits or Losses.

As shown by plaintiff's books:

	August	Average per month for suspension period.	December.
Without depreciation	$ 456.96	$ 400.60	$ 344.23
Depreciation considered	— 2,578.03	— 2,820.64	— 3,063.25
As found by the trial court		7,658.24	

With the August and December figures established by plaintiff's own books, with prices very similar, and with the polymerization unit actually in operation in December, which of the following lines (taken from the above tabulation) make sense, remembering that the first line represents the finding of the court, and the second line, the contention of the defendant?

August.	Average per Month suspension period	December.
—$2,578.03	$7,658.24	—$3,063.25
— 2,578.03	— 2,820.64	— 3,063.25

Even if depreciation could be eliminated, which of the following lines (taken from said tabulation) seems reasonable, again remembering that the first line represents the finding of the court, and the second line the contention of the defendant?

August.	Average per Month suspension period.	December.
$456.96	$7,658.24	$344.23
$456.96	400.60	344.23

It certainly would be remarkable if plaintiff would have made an *average monthly profit* for the suspension period (September, October and November) of $7,658.24 which is what the court found it would have made, when in fact for the months of August and December it only made profits, without any deduction for depreciation, of $456.96 and $344.23, respectively. This would be especially curious since the average price of gasoline during each period was approximately the same and since the polymerization unit was in operation throughout December. *To support the finding of the court we must not only ignore depreciation but assume plaintiff would have made during the suspension period an average profit more*

than 19 times as great as its average profit for August and December.

We submit that if we use as our basis the entire eight months preceding the fire but do consider depreciation as a factor in determining profits, or if we use as our basis the three months from the break in the market to the fire even irrespective of the question of depreciation, or if we use as our basis the months immediately preceding and following the fire, again even irrespective of the question of depreciation, the result is the same, it appears beyond doubt that the plaintiff would not have made the profit or anything like it which the court found it would have made. The finding of the court is, therefore, clearly unsupported by the evidence and the award based thereon greatly excessive.

METHOD B.

Based on Cost of Gasoline to Plaintiff.

Again any one of the three periods may be used as a basis.

(a)

Taking the Eight Months Preceding the Fire as the Basis.

During the first eight months of the year plaintiff purchased and manufactured 6,640,260 gallons of gasoline at a total cost of $320,892.06. This gives an average cost per gallon of gasoline of 4.833¢. During the suspension period the plaintiff purchased 3,104,715 gallons of gaso-

line at a cost to it of $174,329.74 [Appendices 2 and 3]. These figures give the following table:

Total gallons purchased in suspension period	3,104,715	
Actual cost thereof		$174,329.74
Average cost per gallon for all gasoline manufacture and purchased for eight months prior to the fire	$ .04833	
3,104,715 multiplied by $ .04833		150,050.87
Excess of cost during suspension period		$ 24.278.87
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	24,278.87	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 8,696.81
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during suspension period		$ 4,795.66

(b)

Taking the Three Months Preceding the Fire as the Basis.

If, however, we consider only the three months immediately preceding the fire the computation is as follows:

Total gallons purchased in suspension period	3,104,715	
Actual cost thereof		$174,329.74
Average cost per gallon for all gasoline manufactured and purchased for the three months prior to the fire	$ .04912	
3,104,715 multiplied by $ .04912		152,503.60
Excess of cost during suspension period		$ 21,826.14
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	21,826.14	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 11,149.54
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during the suspension period		$ 7,248.39

(c)

Taking the months Immediately Preceding and immediately Following the Fire as the Basis.

The computation is as follows:

Total gasoline purchased during suspension period	3,104,715	
Actual cost thereof		$174,329.74
Average cost per gallon for all gasoline manufactured and purchased in August and December	$ .04864	
3,104,715 x $ .04864		151,013.34
Excess of cost during suspension period		$ 23,316.40
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	23,316.40	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 9,659.28
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during the suspension period		$ 5,758.13

It is obvious that if this be the correct method of ascertaining what results plaintiff would have had during the suspension, it would have sustained a loss for that period instead of making a profit, and this is so no matter which period we use as the basis of our computation.

METHOD C.

Plaintiff's Actual Experience After the Fire.

Had it not been for the fire plaintiff would have manufactured a certain amount of gasoline during the suspension period. It actually purchased 3,104,715 gallons of gasoline during that period [Appendix 3]. Plaintiff itself introduced its Exhibit 7 [Tr. p. 124, Appendix 5] to show that the extra cost of purchasing this *entire* 3,104,715 gallons of gasoline was $30,995.94. However, admittedly plaintiff in any event would have purchased a certain amount of this gasoline. On the trial plaintiff estimated this amount which it would have so purchased at 14%, being the same percentage as it had purchased during the entire preceding eight months. Accepting for the moment plaintiff's estimate of the amount it would have purchased in any event, the extra cost of $30,995.94 must be reduced by this 14% as that much of the extra expense would have been incurred anyhow. The extra cost of purchasing gasoline over manufacturing it attributable to the fire is, therefore, 86% of $30,995.94 which equals $26,656.51.

Obviously this saving of $26,656.51, even had plaintiff been able to make it by continuing to manufacture gasoline, falls far short of being enough to have wiped out its admitted loss for the suspension period of $32,975.68. [Ptf's. Exh. 1, Tr. pp. 67, 251-252].

Even if we add to this saving of $26,656.51 the entire further saving of $3,901.15 which plaintiff claims it would have made from the polymerization unit, we only get a total saving, had there been no fire, of $30,557.66 which

still would be insufficient to turn a loss of $32,975.68 into a profit.

The above may be readily visualized in the following tabular form:

Using Plaintiff's Estimate of Gasoline It Would Have Manufactured During Suspension Period.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons	3,104,715	
Percentage of gasoline plaintiff purchased from January to August, inclusive	14%	
Percentage of gasoline plaintiff manufactured during these 8 months	86%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
86% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	26,656.51	26,656.51
Actual loss less extra cost of manufacturing gasoline		$ 6,319.17
Claimed savings to have been made on polymerization unit		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		2,418.02

The fallacy in plaintiff's estimate of the amount of gasoline it would have purchased anyway, is exactly the same as its fallacy in using the eight months preceding the fire as the basis for determining its profits or loss for the suspension period. Just as the price received by plaintiff for its gasoline broke at the end of May, so also did the prices which plaintiff had to pay for the gasoline it purchased. For the first five months of the year plaintiff was paying an average of 6.968¢ per gallon for the gasoline it purchased, whereas, in June, July and August it paid almost a cent a gallon less, namely, an average of 6.016¢ a gallon [Appendix 3].

With the cost of manufacture remaining constant, it might readily be expected that plaintiff would largely increase the proportion of gasoline which it purchased rather than manufactured during this period of lower prices payable by it. *This is exactly what we find it did do.* For the first five months of the year plaintiff's average monthly purchases were 61,377 gallons, or 7½% of its total gallonage. For June, July and August these purchases increased to an average of 205,755 gallons per month and amounted to 23% of its total gallonage [Appendix 3].

During the suspension period the cost to plaintiff per gallon of gasoline purchased dropped almost another half cent to an average of 5.618¢ per gallon [Appendix 3]. The conclusion is inevitable that plaintiff in the ordinary course of events would have purchased an even greater proportion of its gasoline during the suspension period than during those months of June, July and August.

77% (being the June, July and August percentage of gasoline manufactured) of the 3,104,715 gallons which plaintiff purchased during the suspension period equals 2,390,630 gallons.

Startling conformation of this as the amount which plaintiff would have purchased in any event is found in another and very interesting method of estimating the amount of gasoline which plaintiff would have purchased during the suspension period even had there been no fire. In September plaintiff's business increased 1.6% over August. This percentage added to the amount actually manufactured in August would give a figure of 744,770 as the amount it would have manufactured in September. In the same way we reach the figure of 793,370 gallons for October, 834,934 for November, *and 872,319 for December*. These computations are set forth in Defendant's Exhibit E, Tr. pp. 129, 351. Plaintiff resumed operations in December and in that month *actually manufactured 875,648 gallons* [Tr. p. 271], which it will be observed varies by less than a half a per cent from the amount estimated in Defendant's Exhibit E as that which plaintiff would have manufactured for that month had there been no interruption in its business, and had the cost to it of purchased gasoline remained the same.

On this basis plaintiff would have manufactured 2,373,074 gallons during the suspension period out of the 3,104,715 gallons actually purchased by it. In other words plaintiff would have manufactured 76% of its gasoline.

It is certainly very significant that the percentage of gasoline which plaintiff would have manufactured arrived

at by the method used in Defendant's Exhibit E and which is proved to be extremely accurate by the amount of gasoline plaintiff actually did manufacture in December, gives practically the same result (76% as against 77%) as an estimate based upon the percentage of gasoline manufactured during June, July and August, that is after the drop in cost to plaintiff of purchased gasoline.

Using as our basis the actual increase in the plaintiff's business, we have reached a figure of the amount of gasoline plaintiff would have manufactured which is within ½% of the amount it actually did manufacture in December, but we have argued that the percentage of gasoline which it did manufacture rather than purchase varied with the cost to it of purchased gasoline. Therefore, if we are correct, we should find that the cost of purchased gasoline to plaintiff was approximately the same in December as it was immediately prior to the fire. *And again this is exactly what we do find.* The average cost to plaintiff for gasoline purchased by it in August was 6.070¢ per gallon, while in December it was 6.113¢ or a difference of only .043¢ per gallon [Appendix 3].

We, therefore, submit that our estimate that plaintiff would only have manufactured 77% (we are using this figure as more favorable to plaintiff than 76%) of its gasoline during the suspension period even had no fire occurred is shown logically, mathematically and from plaintiff's actual later experience to be highly accurate and to be infinitely more so than the 86% estimate adopted by plaintiff's auditor, and based on experience when market conditions were very different.

Now let us tabulate the result if we use as the basis the months of June, July and August; that is, the period after the break in the market.

Using the Percentage of Gasoline Plaintiff Manufactured During June, July and August.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons.....	3,104,715	
Percentage of gasoline which plaintiff purchased in June, July and August	23%	
Percentage of gasoline which plaintiff manufactured during these three months	77%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
77% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	23,866.87	23,866.87
Actual loss less extra cost of manufacturing gasoline		$ 9,108.81
Claimed saving to have been made on polymerization unit....		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline.....		$ 5,207.66

We submit that the only inaccuracy in our estimate lies in the fact that we have not taken into consideration the fact that during the suspension period the price paid by plaintiff for purchased gasoline was less than either before or after the suspension period and that, therefore, plaintiff probably would have purchased even greater proportion of its gasoline during the suspension period than our figures show, which of course would give results even less favorable to plaintiff than those at which we have arrived by using our said estimate. Yet, based on our estimate of 77% of its total gallonage as the amount of gasoline plaintiff would have manufactured and using plaintiff's own figures as to the cost of manufacture, we find, as shown in the last table above, that plaintiff would have operated for the suspension period at a loss of $5,207.66.

If we use as the percentage of gasoline which plaintiff would have manufactured during the suspension period, that percentage of gasoline which it actually did manufacture during August and December, the months immediately preceding and following the fire, namely 72%, the extra cost of purchasing gasoline during the suspension period is reduced to 72% of $30,995.94 and we get the following table:

Using the Percentage of Gasoline Plaintiff Manufactured During August and December.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons.....	3,104,715	
Percentage of gasoline which plaintiff purchased in August and December	28%	
Percentage of gasoline which plaintiff manufactured during August and December	72%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
72% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	22,317.08	22,317.08
Actual loss less extra cost of manufacturing gasoline		$10,658.60
Claimed savings to have been made on polymerization unit....		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		$ 6,757.45

In December, the month immediately following the suspension period the polymerization unit was in operation and plaintiff was therefore making upon its manufactured gasoline whatever savings resulted therefrom. Moreover, in December plaintiff manufactured more gasoline

than in any previous month and the cost to it of the gasoline it purchased was higher than at any time since the break in the market at the end of May. Yet, in December it manufactured only 67% of its total gasoline. If we use December as the basis, we get the following table:

Using the Percentage of Gasoline Plaintiff Manufactured During December.

Actual loss		$32,975.68
Gasoline purchased, gallons	3,104,715	
Percentage of gasoline which plaintiff purchased in December	33%	
Percentage of gasoline which plaintiff manufactured in December	67%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
67% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	20,767.28	20,826.63
Actual loss less extra cost of manufacturing gasoline		$12,208.40
Claimed saving to have been made on polymerization unit		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		$ 8,307.25

Again looking at the matter in an entirely different manner, if we are to accept plaintiff's contentions, namely, that it would have made the same profit for each of the months of the suspension period as it had on the average made for the first eight months of the year, then we would expect that after it resumed operations in December it would still have made that same profit for that month of December, and this exclusive of any profit from the polymerization unit, or would have made a greater profit for December if that unit is taken into consideration, since it was not in operation at any time during the eight months prior to the fire, but was in operation in December. *Plaintiff made no such profits in December.* On the other hand, if we are to accept the defendant's contention that a loss would have been sustained in each of the months of suspension period, then we would expect that plaintiff's actual operations in December would also result in a loss, though this loss might be slightly less owing to the fact that the price of gasoline rose from an average of 6.084¢ for the suspension period to 6.093¢ for December, and also because of the polymerization unit. *This is exactly what did occur.* Let us now examine the actual results of plaintiff's operations for December. Taking depreciation into consideration plaintiff operated in December at a *loss* of $3,063.25 as against an average monthly profit for the eight months preceding the fire of $3,274.37 [Appendix 1]. Three times the actual December loss is $9,189.75 which it will be noted very closely approximates the loss, namely, $9,108.81, arrived at by us by using as the basic period to be considered the three months immediately preceding the suspension period, a

period when market conditions were much the same as in December. Without taking depreciation into consideration plaintiff would have operated at a profit of only $344.23 for the month of December as against an average profit of $6,159.32 for those eight months preceding the fire [Appendix 1].

That the average experience of plaintiff for the first eight months of the year furnishes no criterion as to the results of plaintiff's operations in December is conclusively shown by the actual results of these December operations. There certainly is no reason why the average experience over these eight months should furnish an any more reliable guide to plaintiff's experience during the suspension period. This is especially so since market conditions were even less favorable to plaintiff during that suspension period than they were during the month of December. It is again even more especially true when we remember that during practically the entire month of December the polymerization unit was in operation whereas even had there been no fire, it would not have been in operation for over one-third of the suspension period.

Another way of considering the matter is as follows:

Admittedly for the suspension period the plaintiff actually sustained a loss of $32,975.68 [Plf's. Exh. 1, Tr. pp. 67, 251-252]. The court found that had it not been for the fire the plaintiff would have made a profit of $22,974.94 [Tr. p. 145]. In order to have made this profit plaintiff would first have had to wipe out its loss of $32,975.68 and then in addition to have made its profit of $22,974.94. Obviously, therefore, if the finding

of the court is correct the difference made to plaintiff by the fire is the sum of these two amounts, namely $55,-950.62; yet, even taking plaintiff's own figures, including its own estimates as to the cost of manufacture of gasoline and the amount of gasoline it would have manufactured during the suspension period, the excess cost of manufacturing rather than purchasing gasoline amounted only to $26,656.51, being the $30,995.94 shown in Plaintiff's Exhibit 7 [Tr. p. 124], less 14% for gasoline plaintiff admits it would have purchased in any event. This is somewhat less than half of the spread between what plaintiff actually lost and what the court found it would have made. It seems to us too obvious for words that a saving even of $26,656.51 would not obliterate a loss of over $30,000.00, much less change that loss into a profit of over $22,000.00. Yet, as we have said, in this particular computation, we are accepting plaintiff's own figures and plaintiff's own estimates in *toto*.

In order to have turned the actual loss sustained by plaintiff during the suspension period into the profit for that period that the court found plaintiff would have made, it would have been necessary for plaintiff during that suspension period:

1. To have made its saving of $26,656.51 by manufacturing rather than purchasing gasoline;

2. To have made its full claimed savings of $3,901.15 from the polymerization unit; and

3. To have obtained $25,392.96 more from the sale of its gasoline than it actually did obtain during that period.

As it sold 3,104,715 gallons of gasoline during this period, it would have been necessary for it to have obtained .811¢ per gallon in excess of what it did obtain in order to make up this extra $25,392.96.

The average price actually received by plaintiff for gasoline during the suspension period was 6.084¢ per gallon. To have made up the $25,392.96 it would have had to have obtained 6.895¢ per gallon. The average price it obtained for the first eight months of the year was 6.568¢ per gallon, and the average for the first five months of the year, that is before the break in the market, was 6.787¢ per gallon.

Actual figures furnished by plaintiff, even accepting its own estimate of the amount of gasoline it would have purchased anyway during the suspension period, establish that had plaintiff received the same average price for its gasoline during that suspension period as it received during the first five months of the year, it would still have operated at a loss; that had it received during that suspension period the same average price per gallon as it received during the first eight months of the year, its loss would have been considerably greater; that had it received during that suspension period the same average price per gallon as it received during the three months immediately preceding the fire, its loss would have been still greater.

The only condition upon which plaintiff could have made the profit which the court found it would have made, would be for plaintiff to have received for its gasoline approximately the peak price of the year during a period when in fact these prices were at their lowest.

It is submitted that the only way in which the finding made by the trial court that, plaintiff would have made a profit of $22,974.94, may be supported is to ignore both depreciation and the break in prices caused by the gasoline war, and arbitrarily to assume, *in the face of actual figures to the contrary,* that plaintiff would have made the same profit during the suspension period as it made during the first eight months of the year. This is an obviously false premise in view of the very figures submitted by plaintiff and just discussed which prove that even had prices remained at the same average during the suspension period as they averaged during the first eight months of the year, plaintiff would still have operated at a loss for that suspension period. It is an even more false premise in view of the admitted fact that prices did drop sharply in June with not only an immediate and very marked decrease in plaintiff's profits, but with, by August, a change in the results of plaintiff's operations from a profit to a loss.

If we consider the actual figures submitted by plaintiff itself, even as applied to the entire eight month period, or if we consider the results of the break in the market, or if we take into consideration plaintiff's experience thereafter, or if we consider plaintiff's experience for the months immediately preceding and immediately following the suspension period, or if we consider plaintiff's actual experience during that suspension period, the result is always the same. Plaintiff could not have operated at a profit but would have operated at a substantial loss during that suspension period even had its business of manufacturing gasoline not been prevented by the fire.

It is to be remembered that this is not a case in which there is any conflict whatever in the evidence and that in all our calculations we have not used a single figure except those furnished by plaintiff itself and as shown by plaintiff's own books.

The finding of fact made by the trial court that plaintiff would have earned profits of $22,974.94 had it not been for the fire, is not only entirely unsupported by but is in direct conflict with all the evidence in this case.

X.

Polymerization Unit.

So far in our figures we have allowed the plaintiff the full amount of saving which it claims it would have made from the polymerization unit. The court will remember that this unit was not in existence at the time of the fire. In the case of *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Co.* (C. C. A. 4), 64 Fed. (2d) 347, the insured intended closing a portion of its mine known as seam #10. It was feared that the further operation of this seam would endanger the more profitable operations from seam #12. The closing of seam #10, however, would have entailed a loss to the assured, consisting mostly of its capital invested therein. Inasmuch as the insured had intended, in any event, to close this seam, the defendant company contended that its loss from the closing of the seam should be deducted from the anticipated profits of its business as said business was being conducted at the

time of the fire. The court, however, at page 353, held to the contrary:

> "And we agree also that the item of loss resulting from the intended closing of the mine in seam No. 10 is not to be deducted from profits. The profits which the policies guarantee are those which would have been earned above immediate cost of production and fixed charges if the business had not been interrupted; and the fact that the company sustained a loss due to closing down an unprofitable venture would not diminish the profits realized from carrying on a venture that was profitable."

The rule must work both ways. There is not one law for an insured and another for an insurer. If the defendant in the *Fidelity* case was not entitled to a credit for an *anticipated* change in operations that would have reduced the plaintiff's profits, likewise, the plaintiff in the present case is not entitled to an increase because of an *intended* operation, even if that *intended* operation would have resulted in a profit.

Moreover, there is no substantial evidence in the case as to what the result of the operation of the polymerization plant would have been. It is true that Mr. Devere, plaintiff's president, testified that by using a certain formula he arrived at the figure of $3,901.15, and that experience showed that the actual profits from the plant were even greater. However, Mr. Devere did not back up this testimony with any facts or figures, nor show what

was the actual experience with this polymerization plant [Tr. pp. 202-204].

As we have previously shown in this brief the testimony of Mr. Devere was shown to be absolutely contrary to facts when he testified that market conditions remained the same throughout the year; that the fluctuation of profit was caused by plaintiff's endeavors to increase the capicity of its plant; that plaintiff increased its business 20% for the suspension period over the three preceding months, and that the increase in plaintiff's business for November was over 20% of that of August, and that of December over August was 30 to 35%. Consequently we submit that no reliance can be placed upon the general conclusions testified to by him in the absence of a specific showing of the actual results of that polymerization unit after it had once been placed in operation.

We submit neither under the law nor under the evidence in this case can there be any allowance made to plaintiff on account of the claimed profits of the polymerization unit. We, therefore, believe that from all the foregoing figures where they show a profit to the plaintiff there should be deducted the sum of $3,-901.15; that where these figures show a loss that sum should be added thereto; and that the inclusion of this item in the amount awarded to the plaintiff was improper.

XI.

Conclusion.

For each of the foregoing reasons, namely, the failure of the complaint to state a cause of action against the defendant, the failure of the findings to support the judgment rendered, and the insufficiency of the judgment to sustain the finding of the trial court that during the suspension period the plaintiff would have earned a profit from the business prevented by the fire, it is respectfully submitted that the judgment in this case in favor of the plaintiff should be reversed.

Respectfully submitted,

W. O. Schell,

Gerald F. H. Delamer,

Attorneys for Appellant, General Insurance Company of America, a corporation.

Appendix 1.

Profit or Loss During Periods of Actual Manufacture.

[Plaintiff's Exhibit 1, Tr. pp. 68, 273-274, 345.]

Months	Without Depreciation.	With Depreciation.
January	$ 3,990.17	$1,752.19
February	8,460.97	5,438.77
March	8,972.44	6,021.90
April	8,684.92	5,643.80
May	11,371.94	8,249.49
June	3,094.49	734.88
July	4,242.65	931.95
August	456.96	— 2,578.03
December	344.23	— 3,063.25

Depreciation as shown by plaintiff's books and as reported on the Federal Income Tax Returns for the suspension period was as follows [Tr. p. 274]: September $90.79; October $97.17; November $168.70.

Total profit, first eight months, without depreciation	$49,274.54
Total profit, first eight months with depreciation	26,194.95
Total profit, June, July and August without depreciation	7,794.10
Total loss, June, July and August depreciation being taken into consideration	— 911.20
Average profit, first five months, without depreciation	$8,296.09
Average profit, June, July and August, without depreciation	2,598.03
Average profit, first five months, with depreciation	5,421.23
Average loss, June, July and August depreciation being taken into consideration	— 303.73

Appendix 2.

GASOLINE MANUFACTURED.

[Rep. Tr. pp. 271-272.]

Month.	Total gallonage.	Cost per gallon in cents.	Cost per gallon in dollars.
January	587,717	5.015	.05015
February	716,637	4.525	.04525
March	732,480	4.483	.04483
April	759,760	4.436	.04436
May	773,825	4.565	.04565
June	605,771	4.842	.04842
July	806,877	4.447	.04447
August	733,041	4.550	.04550
Average cost per gallon, first five months		4.605	.04605
Average cost per gallon, June, July and August		4.613	.04613
Percentage of gasoline manufactured, first five months			92%
Percentage of gasoline manufactured, June, July and August			77%

Appendix. 3.

GASOLINE PURCHASED.

[Rep. Tr. pp. 267-271, 313-315, 320-321.]

Month.	Total gallonage.	Cost per gallon in cents.	Cost per gallon in dollars.
January	39,201	6.750	.06750
February	54,150	6.948	.06948
March	53,803	7.166	.07166
April	69,907	7.046	.07046
May	89,826	6.932	.06932
June	200,670	5.912	.05912
July	223,947	6.066	.06066
August	192,648	6.070	.06070
September	959,970	5.690	.05690
October	1,039,874	5.609	.05609
November	1,104,871	5.555	.05555
December	430,392	6.113	.06113
Average, first five months		6.968	.06968
Average, June, July and August		6.016	.06016
Average, suspension period		5.618	.05618
Average, August and December		6.091	.06091

Appendix 4.

GASOLINE SOLD.

[Rep. Tr. pp. 258-261.]

Month.	Total gallonage.	Price received per gallon in cents.	Price received per gallon in dollars.
January	604,022	6.485	.06485
February	757,774	6.561	.06561
March	809,216	6.671	.06671
April	841,797	7.014	.07014
May	784,606	7.203	.07203
June	909,440	6.467	.06467
July	874,103	6.171	.06171
August	962,846	5.973	.05973
September	978,121	6.177	.06177
October	1,042,045	6.146	.06146
November	1,096,298	5.928	.05928
December	1,145,562	6.093	.06093
Average price first eight months		6.568	.06568
Average price first five months		6.787	.06787
Average price June, July and August		6.203	.06203
Average price suspension period		6.084	.06084
Average price August and December		6.033	.06033

Appendix 5.

[Plaintiff's Exhibit 7, Tr. pp. 124, 313.]

	Manufacturing Cost per gal.
January	.05015
February	.04525
March	.04483
April	.04436
May	.04565
June	.04842
July	.04447
August	.04550

.36861÷8=8 month average .04608 per gal.

	Purchases	Average mfg. cost.	Difference in cost.	Gallons purchased.	Loss.
September	.05673	.04608	.01065	959,970@.01065	$10,123.68
October	.05609	.04608	.01001	1,039,874@.01001	10,409.13
November	.05555	.04608	.00947	1,104,871@.00947	10,463.13
Loss because of outside purchases					$30,995.94